SUPREME COURT OF APPEALS OF VIRGINIA.

CHESAPEAKE & O. RY. CO. v. CORBIN'S ADM'R.

March 3, 1910.

[67 S. E. 179.]

1. Railroads (§ 356*)—Injury to Persons on Track—"Licensees"—Customary Use of Track.—Where the roadbed of a railroad had long been used with the knowledge and tacit consent of the railroad as a common passageway by the public generally at all times, a pedestrian on the roadbed was a "licensee," and the railroad owed him the duty of ordinary care to avoid injuring him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1228-1234; Dec. Dig. § 356.* For other definitions, see Words and Phrases, vol. 5, pp. 4143, 4144; vol. 8, p. 7706.*]

2. Negligence (§ 83*)—"Discovered Peril."—The doctrine of "discovered peril" is a qualification of the rule that contributory negligence bars a recovery, and involves the principle that, though plaintiff was guilty of negligence in exposing himself to peril, he may recover where defendant, after knowing of the danger, could have avoided the injury by the exercise of ordinary care, but failed to do so.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. § 83.*]

3. Railroads (§ 390*)—Injury to Persons on Track—Licensees—Discovered Peril.—Where a pedestrian killed by a train was a licensee, to whom the trainmen owed the duty of keeping a reasonable lookout to avoid injuring him, and the engineer could have discovered his presence, under circumstances naturally inducing belief that he was unconscious of danger, in time to have warned him of the approach of the train, or to have stopped it and avoided the accident, and failed to do so, the railroad was liable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1324, 1325; Dec. Dig. § 390.*]

4. Railroads (§ 398*)—Death of Licensee—Negligence—Evidence.—In an action for the death of a licensee struck by a train, evidence held to justify a finding of a negligent failure to exercise ordinary care to avoid injuring decedent, authorizing a recovery notwithstanding decedent's negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1356-1359; Dec. Dig. § 398.*]

5. Trial (§ 156*)—Demurrer to Evidence—Determination—Admissions.—Where the jury might have found a verdict for plaintiff, the court on a demurrer to the evidence must so find.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356; Dec. Dig. § 156.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Error to Circuit Court, Alleghany County.

Action by W. W. Corbin's administrator against the Chesapeake & Ohio Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

R. L. Parrish, for plaintiff in error.
Chas. & D. Curry and *Wm. E. Allen,* for defendant in error.

WHITTLE, J. This action was brought by the administrator to recover damages of the Chesapeake & Ohio Railway Company for the alleged negligent killing of his intestate, W. W. Corbin.

The writ of error brings under review a judgment for the plaintiff on a demurrer to the evidence.

The accident occurred in the daytime, within the yard limits, in the town of Covington. The railroad at that point is double-tracked, and runs nearly east and west; east-bound trains run on the southern track, and west-bound trains on the northern track.

For a year prior to his death Corbin had been working as a laborer in Covington and the vicinity, and on the occasion of the accident he was walking in a westerly direction on the southern track, and stepped off between the tracks to avoid an east-bound freight train. He walked on between the tracks until the train had passed, and then stepped upon the northern track, crossing it diagonally, and continued his westerly course, walking on the ends of the cross-ties outside the northern rail. He had proceeded in that manner 20 or 30 steps when he was struck from behind by a regular west-bound freight train, and fatally injured.

The general contentions on behalf of the defendant company are that the train, consisting of 42 empty cars drawn by one of its largest engines, was traversing a curve, which so obstructed the engineer's view of the track that, though he was keeping a reasonable lookout through the front window of his cab, he did not and could not discover Corbin until after he was struck. The fireman, it was said, was engaged in firing his engine to enable it to overcome the heavy grade of the Alleghany mountain, and consequently was not in position to keep a lookout along the track from his side of the cab, and, moreover, that the plaintiff's right to recover is barred by Corbin's contributory negligence.

On the other hand, the fact is not controverted that the roadbed had long been used, with the knowledge and tacit consent of the company, as a common passageway by the general public at all hours of the day and night. Indeed, it was shown to be more traveled by men, women, and children indiscriminately than the streets of the town. Under these circumstances Corbin was a licensee upon the right of way, to whom the company owed the duty of ordinary care to avoid injuring him.

The evidence for the plaintiff tended to show that the train was running at the rate of 10 or 12 miles an hour, and could have been stopped in 150 feet, that the curve ends 20 feet east of the point of collision, and that in looking through the front window of the cab on the engineer's side Corbin could have been seen three rail lengths, or 90 feet, from the cab, which would have placed him 45 feet in front of the pilot. It was likewise shown by actual experiment that, despite the curvature of the track an engineer leaning out of the side window of his cab (the position which the witnesses for the plaintiff testified the engineer was occupying at the time of the accident) was visible to a person standing on the end of the cross-ties, where Corbin was when the collision occurred, from 150 to 200 yards. The evidence furthermore tended to show that the engineer was looking in Corbin's direction; that Corbin was walking slowly along the ends of the cross-ties with his back toward the approaching train, and with an umbrella in his left hand, hoisted, and the handle resting across his shoulder, and with his dinner bucket in his right hand; that he was apparently wholly unconscious of danger. One of the witnesses, who passed him shortly before he was struck, testified that he appeared to be ill. Under these conditions the train was run down upon him without abatement of speed, and without ringing the bell, blowing the whistle, or giving any other signal to warn him of danger. Such warning could have been given when the train was 50 feet away, and one step from the end of the cross-tie would have saved his life.

We are of opinion that upon the demurrer to the evidence the record presents a case for the application of the doctrine of discovered peril. That doctrine is a qualification of the general rule that the contributory negligence of the person injured ordinarily bars a recovery. The exception involves the principle, that, although the plaintiff has been guilty of negligence in exposing himself to peril, he may nevertheless recover if the defendant, after knowing of his danger, could have avoided the injury by the exercise of ordinary care, and fails to do so.

In 29 Cyc. 530, this subject is treated under the subheading, "Injury Avoidable Notwithstanding Contributory Negligence," and there is no principle of the law of negligence of more universal application. The text is sustained by decisions of courts of last resort of most of the states of the Union, of the District of Columbia, the United States courts, and the courts of England and Canada; and in no jurisdiction has the principle been more repeatedly announced than by this court. R. & D. R. Co. *v.* Anderson's Adm'r, 31 Gratt. 812, 31 Am. Rep. 750; Clark's Adm'r *v.* Same, 78 Va. 709, 49 Am. Rep. 394; Farley's Adm'r *v.* Same, 81 Va. 783; Va. M. Co. *v.* Boswell's Adm'r, 82 Va.

932, 7 S. E. 383; C. & O. R. Co. *v.* Lee, 84 Va. 642, 5 S. E. 579; Seaboard & Roanoke R. Co. *v.* Joyner's Adm'r, 92 Va. 354, 23 S. E. 773; Washington & So. R. Co. *v.* Lacy, 94 Va. 460, 26 S. E. 834; Kimball & Fink *v.* Friend, 95 Va. 125, 27 S. E. 901; N. & W. Ry. Co. *v.* Wood, 99 Va. 156, 37 S. E. 846; Humphrey's Adm'x *v.* Valley Railroad Co., 100 Va. 749, 42 S. E. 882; Richmond Traction Co. *v.* Clarke, 101 Va. 382, 43 S. E. 618; Same *v.* Martin's Adm'r, 102 Va. 209, 45 S. E. 886; Green's Adm'r *v.* Southern Ry. Co., 102 Va. 791, 47 S. E. 819; Savage *v.* Same, 103 Va. 422, 49 S. E. 484; Brammer *v.* N. & W. Ry. Co., 104 Va. 50, 51 S. E. 211; C. & O. Ry. Co. *v.* Farrow, 106 Va. 137, 55 S. E. 569; N. & W. Ry. Co. *v.* Denny, 106 Va. 386, 56 S. E. 321; Same *v.* Dean, 107 Va. 505, 59 S. E. 389; Same *v.* Davis, 108 Va. 514, 62 S. E. 337; Roanoke Ry., etc., Co. *v.* Young, 108 Va. 783, 62 S. E. 961; N. & P. Tr. Co. *v.* O'Neill, 109 Va. 670, 64 S. E. 948; N. & W. Ry. Co. *v.* Sollenberger, 66 S. E. 726.

In Seaboard & R. Co. *v.* Joyner, *supra,* the court approved an instruction "that though the plaintiff may have been guilty of contributory negligence, and although that negligence may in fact have contributed to the accident, yet, if the jury believe that the defendant could in the result—that is, after it discovered his peril—by the exercise of proper care and due diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse it."

In the present case the jury would have been warranted in drawing the inference from the evidence that the engineer had actual knowledge of Corbin's peril. But it is not necessary to rest the case upon inference; it is clear that Corbin was a licensee upon the premises of the railway company, to whom its servants owed the duty of keeping a reasonable lookout to avoid injuring him. If in the discharge of that duty the engineer could have discovered Corbin's presence on the track (under circumstances which would naturally have induced belief in a reasonable mind that he was unconscious of danger), in time either to have warned him of the approach of the train or to have stopped it and avoided the accident, and failed to do so, then the company would be liable.

In Blankenship *v.* C. & O. Ry. Co., 94 Va. 449, 27 S. E. 20, it was held, that where a railroad company knows that its right of way is constantly used as a footway by the public, it is the duty of the servants of the company to exercise reasonable care to discover persons so using the right of way, and to endeavor to avoid injuring them.

In Williamson *v.* Southern Ry. Co., 104 Va. 146, 153, 51 S. E. 195, 197 (70 L. R. A. 1007, 113 Am. St. Rep. 1032), the court said: "The obligation is not an absolute one to discover the plain-

tiff, but it is only the duty of using ordinary care to keep a reasonable lookout under the conditions and circumstances existing at the time the point is reached, where the licensee may be reasonably expected."

In N. & W. Ry. Co. *v.* Carr, 106 Va. 508, 56 S. E. 276, it was held: "It is the duty of those in charge of a railroad train to keep a reasonable lookout at places constantly used, with the knowledge of the company, at all hours of the day by large numbers of men, women, and children, and for an injury proximately resulting from a failure to keep such lookout the company is liable."

So, in Shear. & Red. on Neg. (4th Ed.), § 484, it is said: "A railroad engineer is not bound usually to foresee the wrongful presence of any person upon the track, even where it was open to an adjoining highway, nor to foresee the wrongful entry of persons on its cars; but, if his experience has shown that persons are constantly thus entering upon the tracks or the cars, such persons, if injured by reason of the engineer's failure to use ordinary care to keep watch for them, may recover damages if the engineer could have seen them without difficulty had he kept a reasonable watch, even though in fact he did not see them. This qualification of the general rule has been sometimes denied, but incorrectly."

At section 99, the learned authors observe: "The plaintiff should recover, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was proximately caused by the omission of the defendant, after having such notice of the plaintiff's danger as would put a prudent man upon his guard, to use ordinary care for the purpose of avoiding such injury. It is not necessary that the defendant should actually know of the danger to which the plaintiff is exposed. It is enough if he has sufficient notice or belief to put a prudent man on the alert, and he does not take such precautions as a prudent man would take under similar notice or belief." 1 Thomp. on Neg. § 1737.

In Shear. & Red. on Neg. (5th Ed.), § 101, it is said: "Plaintiff last in fault.—The foregoing rule obviously does not apply where the plaintiff's contributory negligence is, in order of causation, either subsequent to or concurrent with that of the defendant. Therefore, while one negligently walking upon a railroad is generally entitled to recover if an engineer, seeing him, makes no effort to check the train, he cannot recover if, after becoming aware of his danger, he makes no proper effort to escape."

In the case in judgment the negligence of the plaintiff's intestate in walking along the ends of the cross-ties is conceded, and such negligence would have barred a recovery but for the

negligence of the engineer in failing to exercise reasonable care to discover Corbin's presence on the track and to protect him. Whether or not he discharged that duty is a question of fact about which reasonably fair-minded men, upon the evidence, might differ. If the jury chose to believe the witnesses for the plaintiff, their testimony was quite sufficient to have warranted them in finding a verdict for the plaintiff, and the rule is well settled that, where the jury might have so found on the defendant's demurrer to the evidence, the court must so find. Bass *v.* Norfolk Ry., etc., Co., 100 Va. 1, 40 S. E. 100; Fisher *v.* C. & O. Ry. Co., 104 Va. 635, 52 S. E. 373, 2 L. R. A. (N. S.) 954.

Judgment affirmed.

Affirmed.

NOTE.

This case is a sufficiently interesting one to induce the REGISTER to depart from its rule of not reporting in full cases merely involving the liability of railroad companies for injuries caused by negligence. It clearly and emphatically lays down the rule that a railroad company *does owe to a true licensee the duty of keeping a reasonable lookout,* i. e., that it must keep a reasonable lookout to ascertain his presence upon the track in a place where his presence may reasonably be expected, following and reaffirming the principle of the cases of Blankenship *v.* C. & O. Ry. Co., 94 Va. 449, 27 S. E. 20, and Norfolk, etc., Ry. Co. *v.* Carr, 106 Va. 508, 56 S. E. 276.

The principal case does not allude to the case of Norfolk, etc., Ry. Co. *v.* Stegall, 105 Va. 538, 12 Va. Law Reg. 489, 54 S. E. 19, although the opinion in that case, as here, was written by Judge Whittle. The latter case was the occasion of a critical and illuminating article by Mr. Robert W. Withers in 12 Va. Law Reg., p. 419, in which he argues that the Stegall case is a departure from the rule laid down in prior cases as to the duty of a railroad company to keep a reasonable lookout for licensees upon its track. It is reasonable to suppose, from the fact that the opinion in the principal case does not refer to the Stegall case, that it is not considered to be overruled, or to be inconsistent with the prior cases and the principal case. Another case very similar to the principal case, and decided a year later than the Stegall case, is that of Norfolk, etc., Ry. Co. *v.* Carr, 106 U. S. 508, 56 S. E. 276, 13 Va. Law Reg. 118. This case also ignores the Stegall case, but is approved and followed by the principal case.

Let us see if the apparent conflict, for it must be admitted that there is an appearance of such, can be explained, at least in part, by a confusion in the use of terms. Let us see whether "licensee," as used in the various cases bearing on this question of the liability of a railroad company to a person upon its tracks who is not a trespasser, means the same thing every time, and particularly as used in the Stegall case, as compared with the principal case and those it follows.

As pointed out in Mr. Withers' article above referred to, there seems to be a distinction attempted to be drawn between the duty of the railroad company to such persons, in respect to *prevision* or taking precautions in advance for their safety, and in respect to keeping a reasonable lookout for them to avoid injuring them. The latter duty he calls the duty to make use of the facilities and appliances in use, as contrasted with the duty to provide such facilities and ap-

pliances for their benefit. The distinction between the two becomes very hazy at times, as will be dwelt upon below.

It seems to the writer that if we are careful to recognize that the term "licensee" has been made to do double duty, we will partially clarify our vision; and then if we can get away from the labored distinction that we have been attempting to preserve, in defiance of common sense, between the duty of "prevision" or foresight and the duty of keeping a reasonable lookout, we will have found the clue that will lead to the solution of most if not all of the tangles in which the various decisions and dicta threaten to involve us when we try to reconcile them.

Taking up the latter suggestion first, if we substitute for this hazy distinction between the duty owed to true licensees and that owed to passengers and other more favored classes who are liable to be injured by railroad trains, the principle that the railroad owes to all of them, outside of the class of trespassers or *bare* licensees (as to whom more anon), the *same* duty of foresight and provision for their safety, but in *differing degrees,* we will have made a long step in the right direction. In other words, to passengers and all belonging to that favored class, it owes the highest degree of care and diligence in discharging this duty, while to the licensee the railroad owes merely ordinary care or reasonable diligence. When we have done this we have done justice to the railroad company, and avoided the necessity of drawing fine and unreasonable distinctions between the duty of keeping a lookout by the agency of the engineer and fireman, and that of providing a headlight to enable such lookout to be kept, which it has been held does not exist; between the duty to look out by the crew of the engine and absence of the duty to provide a lookout at the head of a train of cars in front of the engine which absolutely nullifies any lookout kept by the engineer and fireman, which absurdity really was at the bottom of the decision in the Stegall case, which, however we may seek to justify it and reconcile it with the other cases, among which is the principal case, remains absolutely wrong. Indeed so our court of appeals has perhaps tacitly admitted.

The Stegall case was decided upon a demurrer to the declaration and each of the two counts thereof. The first count was held to be plainly insufficient. The second alleged that the plaintiff was injured while on the railroad track at a place which, "with the knowledge and consent of the defendant, was constantly used by the public for that purpose," i. e. for passage, through the defendant's negligence in propelling an engine with cars in front of it along that portion of its track, "with no lookout upon the end of the cars" at a dangerous rate of speed. If this was ordinary care in keeping a lookout, then of course the railroad was not liable, but if it was not, the plaintiff, if a true licensee, was entitled to recover, according to the prior cases. The court, speaking by Judge Whittle, admitted this, but held that what was charged, namely negligence in so pushing the cars without a lookout in front (where alone it could do any good) did not constitute negligence or a breach of duty as to the plaintiff. The court then lays down the rule as to a *bare* licensee, and this would seem to be the only tenable ground on which the decision could be based. If he was a *bare* licensee, then he was in the same position as a trespasser, and there are many Virginia cases which hold that neither bare licensees or trespassers have a right to have a lookout kept for them.

Whether this distinction (between trespassers and licensees) is well grounded or not, it seems to hold in Virginia, though not in West Virginia, and it is the only way to account for the decision in the Ste-

gall case, although it is hard to see how the court arrived at the conclusion that Stegall was not a true licensee, under the allegations of the declaration as admitted by the demurrer. This explanation of the Stegall case is not touched upon by Mr. Withers, which is the apology for thus enlarging upon it here.

A useful and orderly arrangement of the Virginia and West Virginia cases will be found in 11 Va.-W. Va. Enc. Dig. p. 570, et seq., and a survey of them there will show how confused the statements of law, the reasons therefor and the use of terms are.

As a practical working theory the writer suggests the following: First we must divide all persons injured on railroad tracks or premises, who are not passengers, into *trespassers* and *licensees,* and with the former we must class, if we recognize any distinction at all between them, the party spoken of in the cases as a *bare licensee,* for the same duty is owed by the railroad company to each, and neither is entitled to have a lookout kept for him, but the bare licensee merely escapes the responsibility of being a trespasser. We must be very careful not to call them licensees or to apply the rules applicable to licensees to them. Such would seem to be persons on railroad premises by sufferance, but where no such usage has grown up with the knowledge and consent of the railroad company as to require it to anticipate their presence there and to look out for them. Whether the distinction between such persons and true licensees is a useful or logical one, is at least doubtful, but it undoubtedly exists in Virginia, although not in West Virginia.

Secondly, as to the duty owed by the railroad company to these classes:

1. To trespassers (including the bare licensees) it owes merely the duty to use reasonable care to avoid injuring them *after* it has become aware of their presence upon the track or right of way, in a position of danger to themselves, and which the company has some reason to suppose they will not avoid of their own volition in good time. It owes them no duty of foresight or prevision, or any care at all until their presence is actually discovered by the company's employees in control of the train.

2. To licensees it owes the duty of keeping a reasonable lookout for them where it has reason to anticipate their presence on its track or premises, and then to take reasonable care to avoid injuring them. *But it is submitted that to attempt to distinguish between a duty to look out, and a duty to take reasonable precautions (not the highest degree of care) to render such lookout effectual, is neither reasonable, logical, nor good law,* except so far as the Virginia precedents have given it the force of such. The distinction between the duty of *prevision* and the duty to look out is indefensible and the sooner we get away from it the better for the consistency of our decisions upon this important subject.

Let us apply these rules to a few cases, and see how they work. In the Stegall case, if the court was right in calling Stegall a bare licensee, then the rule as to trespassers was properly applied to him, and the case correctly decided; but if he was a licensee in the proper sense of the word, then to draw the distinction between the duty to look out from the engine where the engineer and fireman were, and to *provide* a lookout on the front of the cars, where alone it would do the licensee any good, merely involved the court in a very unnecessary difficulty, and led to confusion. Under this rule here suggested, the railroad was liable if it did not use *ordinary* care to lookout for him in the manner required by the conditions under which the engine or train was run.

Chesapeake, etc., Ry. Co. *v.* Rogers, 100 Va. 324, 41 S. E. 732, and Williamson *v.* Southern Ry. Co., 104 Va. 146, 51 S. E. 195, would have been decided, not by the "prevision rule" that a railroad company does not owe a licensee the duty of blowing its whistle, ringing its bell, running its engine at a particular rate of speed, or having a light on its engine, but by the answer to the question whether reasonable care in looking out for such licensee involved the use of these means or any of them. The confusion of thought and inconsistency of the reasoning in these two cases are clearly pointed out by Mr. Withers at p. 426, et seq.

Nichols *v.* W. O. & W., R. Co., 83 Va. 99, 5 S. E. 171, would have been decided according to the proper answer to the inquiry whether the railroad company used ordinary diligence to look out for and avoid injuring plaintiff, he being a true licensee.

Blankenship *v.* C. & O. Ry. Co., 94 Va. 449, 27 S. E. 20, seems to have been decided, on the facts, in entire accordance with the principles enunciated above; so with the ease of Va. Mid. R. Co. *v.* White, 84 Va. 408, and it approves a Wisconsin case (Davis *v.* Chicago, etc., R. Co., 58 Wis. 646) where any distinction between *prevision* and the duty to look out is ignored.

Norfolk, etc., Ry. Co. *v.* Wood, 99 Va. 156, 37 S. E. 846, again draws the "prevision" distinction, instead of basing its decision on whether, under the circumstances, due care was exercised towards the plaintiff, if he was where the railroad had reason to expect the public to be. If his injury was caused by a breach of this duty of ordinary care, then the railroad company should have been liable, as he was on a station platform, although he is called here a "bare licensee!"

Finally, Norfolk & W. Ry. Co. *v.* Carr, 106 Va. 508, 56 S. E. 276, and the principal case, both seem to have been decided, on the facts, so far as applicable, in accordance with these principles as to licensees, although the opportunity for making any distinction as to prevision did not offer.

Time and space alike forbid any inquiry into the interesting question as to the rule prevailing in other jurisdictions. Perhaps at another time we may pursue it, or we would welcome further light from a more able pen, to the end that if we have educed any principles that are true and tend to an increased clearness of the perception of the right of these questions, they may be affirmed, but if they are false, then that their fallacy may be made to appear. Note however, that it is not claimed that many of the Virginia decisions are not opposed to these suggestions, and it should be added as a qualification of the rule that would make the railroad liable for failure to provide reasonably efficient means of looking out for and protecting, or rather not injuring licensees, that it must be limited to negligent acts or omissions having a direct and close connection with the safety of the licensee. It would exclude defects in railroad material and equipments which could not reasonably be expected to prevent the company from properly looking out for licensees and avoiding injury to *them*. If it be said that such rules are too hard on the company, as said in the Williamson case, supra, the answer is that the railroad companies have the remedy in their own hands. If they find the burden of the licensee doctrine too heavy, then let them break up the practise that gives rise to the doctrine. As soon as they make an honest effort, persisted in, to enforce the laws against railroad trespass, these persons cease to be licensees and become trespassers, and the rule passes away with the reason thereof.

J. F. M.